United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

F 952

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,100

CLIFTON H. WINSTON, JR.,
Appellant

v.

UNITED STATES OF AMERICA,
Appellee

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

United States Court of Appeals
for the District of Columbia Circuit

FILED DEC 11 1967

Nathan J. Paulson
CLERK

ROBERT M. SCOTT
Counsel for Appellant
(Appointed by this Court)

James C. Demas
Counsel for Appellant

Gall, Lane and Powell
1250 Connecticut Avenue, N.W.
Washington, D. C. 20036

STATEMENT OF QUESTIONS PRESENTED

1. Did not the court below deprive Appellant of a fair and impartial trial by reason of its instruction, given over objection, which admonished the jury that a crucial defense witness's testimony that he had seen persons other than the Appellant and the co-defendant commit the crimes then being tried had to be "received with suspicion and acted upon with caution" because such witness was an informer and had previously given that same information to the employer of the complaining witness in hope of a reward?

2. Was it not prejudicially erroneous for the court below to have given the instruction referred to above in view of the following facts:

a. The witness was a private citizen;

b. The said information had been given by the witness to the said employer eight months prior to the time he appeared and testified at the trial;

c. The witness did not volunteer himself to the defense; to the contrary, the existence of such witness and his knowledge of the crimes then being tried became known to the defense only as a result of trial counsel obtaining his name during the course of the trial from the files of the said employer, and his appearance at the trial followed thereafter.

3. Did the court below, upon the facts of the record, err in admitting into evidence a gun and a towel which were seized from Appellant's co-defendant at the time the two of them were arrested?

INDEX

	Page
STATEMENT OF QUESTIONS PRESENTED.	i
TABLE OF CITATIONS.	iii, iv
JURISDICTIONAL STATEMENT.	1
STATEMENT OF THE CASE.	2
STATUTE AND RULES INVOLVED.	11
STATEMENT OF POINTS.	12
SUMMARY OF ARGUMENT.	12
ARGUMENT.	15
I. THE TRIAL COURT'S CHALLENGED INSTRUCTION CONCERNING THE CREDIBILITY OF DEFENSE WITNESS SHULER CONSTITUTED REVERSIBLE ERROR IN THAT IT DEPRIVED APPELLANT OF A FAIR AND IMPARTIAL TRIAL.	15
The Influential Role of the Instruction in the Case.	15
The Challenged Instruction When Applied to the Facts of This Case, Required That the Jury Consider Shuler's Testimony With Suspicion and Caution. . .	16
A. THE USE OF THE INFORMER INSTRUCTION TO DISCREDIT THE TESTIMONY OF A DEFENSE WITNESS IS A PERVERSION OF ITS PURPOSE AND SUCH USE DEPRIVES AN ACCUSED OF A FAIR AND IMPARTIAL TRIAL.	17
B. UPON THE FACTS OF THIS CASE IT WAS PREJUDICIALLY ERRONEOUS TO HAVE GIVEN THE CHALLENGED INSTRUCTION.	28
II. THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANT IN ADMITTING INTO EVIDENCE A TOWEL AND GUN (GOVERNMENT EXHIBITS 1 AND 2) IN THAT THESE ITEMS WERE THE PRODUCT OF AN ILLEGAL SEARCH AND SEIZURE.	32
CONCLUSION.	33

TABLE OF CITATIONS

CASES: Page

Fletcher v. United States, 81 U. S. App. D.C. 306, 158 F.2d 321 (1946) 17 18 25n

Hair v. United States, 110 U. S. App. D.C. 153, 289 F.2d 894 (1961) 32

Joseph v. State, 34 Tex. CR. R.446, 30 S.W. 1067 (1895) 26 27n

Luck v. United States, 121 U.S. App. D.C. 151, 348 F.2d 763 (1965) 21 28n

McDonald v. United States, 335 U.S. 451, 93 L.Ed 153, 68 S.Ct. 191 (1948) 32

Nelson v. United States, 93 U.S. App. D.C. 14, 206 F.2d 805 (1953) 32

People v. Bonney, 99 Cal. 270, 33 P. 99 (1893) 23 27n

People v. O'Brien, 96 Cal. 171, 31 P. 45 (1892) 22

Schoeneman v. United States, 115 U.S. App. D.C. 110, 317 F.2d 173 (1963) 32

State v. Reeder, _____ Mo. _____, 395 S.W. 2d 209 (1965) 21n 24 27n

Wynn v. United States, _____ U.S. App. D.C. _____ (Nov. 16, 1967) 29

STATUTES:

	Page
D. C. Code §22-502 (1967)	11
D. C. Code §22-2901 (1967)	11
D. C. Code §22-3204 (1967)	11

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,108

CLIFTON H. WINSTON, JR.,
Appellant

v.

UNITED STATES OF AMERICA,
Appellee

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLANT

Jurisdictional Statement

This is an appeal from a verdict and judgment of guilty entered on a four count 1/ indictment in which Appellant and the co-defendant, Hawkins, were charged with robbery, assault with a dangerous weapon and

---

1/ Count one and two jointly charged Appellant and Hawkins of robbery and assault with a dangerous weapon. Count three charged Hawkins with carrying a concealed weapon and count four similarly charged appellant. All the counts relate to a single series of events arising out of a robbery in the District of Columbia.

carrying a concealed weapon. Pursuant to the judgment Appellant was sentenced under the Youthful Corrections Act and placed on probation. This Court granted Appellant's application to appeal in forma pauperis.

This Court has jurisdiction over the appeal by virtue of U.S.C. § 1291.

Statement of the Case

Pretrial Motion

Prior to trial Hawkins filed a motion to suppress a pistol and a towel, allegedly used in the robbery, which had been seized from Hawkins at the time he and Appellant were arrested. The basis of the motion was a lack of sufficient probable cause to support the arrest and the search and seizure.

After a hearing in which Officer Liptak, the arresting officer, and Hawkins testified, the motion was denied. (Supp. T. 1-23).

The Government's Evidence

Mr. Warren Moon, a bus driver for D. C. Transit, testified, as follows: on the evening of June 30, 1966, he was operating his bus in the northeast section of Washington, D. C.; at approximately 10:30 p.m., while on a lay-over at 13th and D Streets, N. E., two young men boarded his bus and a third person stood just outside the door of the bus (T. 26); the first young man on the bus asked for

directions; the second man then stepped forward, revealed and pointed a pistol partly covered by a green towel, and demanded that he give him money (T. 23); he gave them his money and the three men fled (T. 26); he immediately called his dispatcher who in turn contacted the city police. (T. 29, 84).

Police officers Liptak and Myers responded to the scene and obtained a brief description of the two men who boarded the bus. (T. 109, 113, 119). Mr. Moon described the first man as Negro, 18 or 19, and wearing a plaid shirt, and the second man as Negro, light-skin, taller than the first man, wearing a light shirt and fairly dark trousers, and carrying a pistol and light-colored towel. (T. 113, 119-121).

Officer Liptak testified, as follows: Shortly thereafter obtaining the description and while cruising the area, he observed Appellant and Hawkins walking along 13th Street approximately three blocks from the scene of the roberry (T. 109-110, 127); he stopped them because Appellant, in his opinion, matched one of the general descriptions given by Mr. Moon (T. 113); after apprehending them, he observed that Hawkins was carrying a light-colored towel in his hand (T. 112, 128-129); he seized the towel from Hawkins and discovered a pistol, clip and brown paper bag wrapped inside of it (T. 113-114); he then completed the search of their persons and brought both of them

back to the scene of the robbery (T. 117). There Mr. Moon identified Appellant as the one who held the gun on him (T. 23-24). Mr. Moon could not identify Hawkins.

Over the objection of counsel for both Hawkins and Appellant, the towel, gun, clip and paper bag were admitted in evidence as Government Exhibits One - Four. (T. 178-181).

It was also stipulated that the records of the Metropolitan Police Department revealed that neither Hawkins nor Appellant had a license to carry a pistol within the District of Columbia on June 30, 1966. (T. 182-183).

Defense Evidence

Appellant and Hawkins both testified and denied their involvement in the robbery. Appellant testified that he met Hawkins earlier on the evening of June 30 (T. 352, 363); that around 10:00 p.m. they walked to the corner of 13th and D Streets, the scene of the robbery, where they met and engaged in conversation with Diane Lee and Ethel Webster (T. 353-356); that approximately fifteen minutes later Appellant and Hawkins then left the girls, walked across the street in front of the bus, and proceeded south on 13th Street (T. 357); at that time he saw police cars in front and in back of the bus (T. 365); after engaging in a short conversation with a woman concerning the repair of her washing machine, they continued on 13th Street toward Lincoln Park where they were arrested by Officer Liptak. (T. 357-359).

Hawkins admitted that the green towel (Gov. Ex. 1) was his. He stated he had been using it throughout the evening to wipe perspiration from his face (T. 429). Hawkins further testified that, while they were in the vicinity of the bus, someone ran by him and dropped a paper bag in a tree-box nearby and that he retrieved the bag and discovered it contained a pistol and clip. (Gov. Exs. 2 and 3). (T. 430-431).

Ethel Webster and Diane Lee both corroborated Appellant's testimony by testifying that on this particular evening they casually met Appellant and Hawkins on the corner of 13th and D Streets; that during the course of their conversation they noticed a police car pull in front of the bus (T. 313-314); thereafter Appellant and Hawkins left them and walked south on 13th Street while they remained on the corner (T. 314-315).

Emma Hansford, a neighbor of the Appellant, testified that she had known the Appellant for 12 years and that his reputation within the neighborhood was that of an honest and law abiding citizen (T. 409).

We digress at this point in order to call to the Court's attention the circumstances surrounding the appearance of the witness Shuler: During the trial, Mr. Moon had testified that he had given his employer the name of a person who might possibly be a witness to

the crime and, in response to defense counsel's question, he stated that such name would probably be available through the "Legal Department" (T. 104). The trial court suggested that counsel "get in touch with" the head of D. C. Transit's legal department to obtain the name of the possible witness (T. 104-105). As a result of conversations with Transit personnel, trial counsel learned of the existence of Shuler and of the fact that, on September 7, 1966--some eight months earlier --, he had given Transit the names of persons other than Appellant and the co-defendant as the perpetrators of the crimes then being tried (T. 195, 227-228, 243, 383, 411-414).

After trial counsel located Shuler, he interviewed Shuler and learned of Shuler's knowledge of the crime and the surrounding events (T. 227); as a result, trial counsel had Shuler come to court and then asked Mr. Moon if he had ever seen Shuler before (T. 193). Mr. Moon said that Shuler looked like one of the persons who robbed him, but that he could not be sure (T. 193). Because of this comment by Mr. Moon, the court undertook to advise Shuler that he did not have to testify (T. 226-230). The court, inter alia, asked Shuler, "Do you feel that any truthful answers you would give would not tend to incriminate you or otherwise subject you to criminal prosecution as a result of the incident into which we are inquiring?," to which Shuler replied, "No, sir" (T. 229).

Thereupon Shuler testified that he was standing on the corner near the bus, that he saw three young men commit the robbery (T. 232) and that neither Appellant nor Hawkins was one of those young men (T. 239); that he spoke to Mr. Moon and a police detective shortly after the robbery and gave them his name and address (T. 236-237, 242); that he subsequently met with a D. C. Transit official concerning this robbery, as well as a later robbery which he had also witnessed, and furnished the names of several suspects. (T. 230, 241, 260)

For the purpose of confirming that the witness Shuler had given D. C. Transit the names of persons he said he saw commit the crime in question (T. 303-304), the defense called that company's Director of Security, who testified that Shuler had given them such information on September 7, 1966 (T. 374, 376). During his examination, trial counsel for Appellant used the word, "informant," in referring to Shuler (T. 372). 2/ On cross-examination of that witness, the government attorney developed that D. C. Transit had a policy of giving rewards for information pertaining to crimes, that Shuler was aware of the policy, and that the possibility of a reward was the reason

---

2/ By trial counsel for Appellant: "Q. Are you acquainted with a young Negro male by the name of Tyrone? A. I met such a person. Q. Does your company have an informant that goes by that name, sir, or an informant by that name? A. This would be an informant? Q. Yes sir." (T. 373)

Shuler had given the information (T. 382). The court below, on its own initiative, stated that, in view of the testimony concerning a reward, it would have to give "the informer instruction respecting the testimony of Shuler, if the defense has characterized him as an informer." (T. 384) Defense counsel objected on the basis that Shuler was not an informer and that the informer instruction did not apply "in this kind of situation." (T. 385) The Court stated, "He is getting money for his information," to which the defense replied that there was no evidence that he had . (T. 385) Thereupon the court reiterated that he would give the instruction because the "jury is entitled to know the type of witness we are dealing with" (T. 385). As a result, defense counsel elicited from the witness from D. C. Transit that Shuler had not received a reward (T. 386), which answer prompted the court to pursue the subject and develop that a reward is paid if the information leads to the arrest and conviction of persons and that no reward had been paid to Shuler (T. 388).

The foregoing line of inquiry prompted defense counsel to make a motion for a mistrial which was denied (T. 389).

The Challenged Instruction

The court singled out the testimony of Shuler and gave the following instruction thereon:

> "Now ladies and gentlemen, in the argument of respective counsel, there was some reference

to the witness Shuler. You may recall the testimony of the witness from the Capital Transit Company, one Hughes, who characterized the witness Shuler as an informer.

The Court wishes to give you this instruction as to what is involved in this situation so that you may properly evaluate it.

One of the witnesses called by the defendant Winston, Tyrone Shuler, was described by another witness for Winston, one Hughes, of the Capital Transit Company, as an informer. The testimony of Hughes, as the Court recalls it, and here again the Court wishes to emphasize, it is your recollection of the testimony which should be controlling during your deliberations, that Shuler had given information to this company concerning certain violations of law said to have been committed on company busses. The company agreed to compensate Shuler on a contingent basis. That is to say, he would be paid if the information he gave led to the conviction of one against whom he gave the information.

If you find from the evidence before you that Shuler was, in fact, an informer, then you should not disregard his testimony solely for this reason. However, you may find from the evidence that he had a contingent interest in giving the testimony to the Capital Transit Company, as a result of which his testimony should be examined by you with greater care than the testimony of an ordinary witness. You should scrutinize it closely to determine whether it is colored in such a way as to cause doubt concerning the guilt of the defendants in this case, for the reason that the witness Shuler had implicated others in this crime, and that if these others were proven guilty, he would stand to benefit thereby.

If you determine from all the evidence that Shuler was, in fact, an informer, and that he had a

contingent interest in the outcome of the case, then you should receive his testimony with suspicion and act upon it with caution.

Now on the other hand, you may find from the evidence that Shuler was not, in fact, an informer of the D. C. Transit Company, or even if he was an informer, that his contingent interest in the possible future conviction of others for the crime charged against these defendants too remote to constitute an interest in the outcome of the trial, and that his testimony is therefore entirely free from pecuniary or other objectionable motivation.

In that case you need not treat the testimony of the witness Shuler with any particular suspicion or caution but may give it such weight as you feel it is entitled to, remembering that you are the sole judges of the credibility of each and all of the witnesses in the case." (T. 550-552)

Immediately prior to the conclusion of its charge, the court again referred to Shuler's testimony:

> "Now ladies and gentlemen, there has been in the Court's instructions some reference to the testimony of the witness Shuler. The Court wishes to give you this additional short definition from Black's Law Dictionary as to what an informer is: 'A person who informs or prefers an accusation against another whom he suspects of the violation of some penal statute' is an informer." (T. 567)

The giving of the foregoing instruction had been vigorously objected to the trial counsel from the very first suggestion of the court that it intended to do so (T. 385, 389, 472-477).

Statutes and Rules Involved

District of Columbia Code §22-502. Assault with intent to commit mayhem or with dangerous weapon.

> "Every person convicted of an assault with intent to commit mayhem, or of an assault with a dangerous weapon shall be sentenced to imprisonment for not more than ten years." (Mar. 3, 1901, 31 Stat. 1321, ch. 854, §804.)

District of Columbia Code §22-2901. Robbery.

> "Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years." (Mar. 3, 1901, 31 Stat. 1322, ch. 854, §810.)

District of Columbia Code §22-3204. Carrying concealed weapon.

> "No person shall within the District of Columbia carry either openly or concealed on or about his person, except in his dwelling house or place of business or on other land possessed by him, a pistol, without a license therefor issued as hereinafter provided, or any deadly or dangerous weapon capable of being so concealed. Whoever violates this section shall be punished as provided in section 22-3215, unless the violation occurs after he has been convicted in the District of Columbia of a violation of this section or of a felony, either in the District of Columbia or in another jurisdiction, in which case he shall be sentenced to imprisonment for not more than ten years." (July 8, 1932, 47 Stat. 651, ch. 465, §4; Nov. 4, 1943, 57 Stat. 596, ch. 296; Aug. 4, 1947, 61 Stat. 743, ch. 469; June 29, 1953, 67 Stat. 94, ch. 159, §204(c)).

Statement of Points

1. It was prejudicially erroneous for the court, over objection, to have instructed the jury to "receive with suspicion and act upon with caution" the testimony of defense witness Shuler that he had seen persons other than the Appellant and the co-defendant commit the crimes then being tried solely because Shuler had previously given this same information to the employer of the complaining witness in hope of a reward:

   a. As a matter of law, the giving of such instruction denied Appellant of a fair and impartial trial.

   b. Upon the particular facts of this case, it was prejudicially erroneous to have given such instruction.

2. The admission into evidence of a gun and a towel seized from the co-defendant when he and Appellant were arrested was prejudicially erroneous because such arrest was not based upon probable cause.

Summary of Argument

The witness Shuler did not testify in the classical role of an informer; indeed, he testified in behalf of the accused, not against them. Accordingly, it was not only inappropriate for the court to admonish the jury to receive Shuler's testimony with "suspicion and

to act upon it with caution" -- an admonition designed to benefit an accused --, but it was prejudicially erroneous to have done so because such instruction worked against the interest of the accused for it completely, and with utter finality, undercut affirmative testimony that was extremely helpful to the Appellant's and his co-defendant's defense and cast doubt over the entire defense. Moreover, it was prejudicially erroneous, under the facts of this case, to give that or any other cautionary instruction which cast doubt upon the testimony of Shuler because of the fact that he had, at a point prior to the trial, given information to Transit in the hope of a reward, for it was perfectly clear from the record that the possibility that Shuler might be coloring his testimony in the hope of a reward was too remote to have that possibility commented upon in an instruction: Shuler did not volunteer his testimony to the Appellant and his co-defendant, but, to the contrary, he appeared and testified only as a result of his name and his knowledge of the crime becoming known to the accused from the files of the employer of the complaining witness which were made available to the accused during the trial which occurred some eight months after Shuler had given the information to the said employer. Under these circumstances, it would be wholly unreasonable for anyone to conclude that his testimony had been motivated by the hope of reward, and, accordingly, it was prejudicially erroneous to give any instruction which brought this remote possibility

specifically to the jury's attention. But even if the possibility of obtaining a reward could somehow be considered relevant in the assessment of his testimony, the proper instruction thereon would have simply advised the jury that, in evaluating his testimony, they could consider whether such possibility of reward had influenced his testimony.

Appellant adopts that portion of the brief of Appellant in No. 21291 which asserts that the court below erred in admitting a gun and a towel into evidence.

ARGUMENT

I

THE TRIAL COURT'S CHALLENGED INSTRUCTION CONCERNING THE CREDIBILITY OF DEFENSE WITNESS SHULER CONSTITUTED REVERSIBLE ERROR IN THAT IT DEPRIVED APPELLANT OF A FAIR AND IMPARTIAL TRIAL

The Influential Role of the Instruction in the Case

The principal issue in the trial below insofar as Appellant was concerned was that of identification. Mr. Moon, the complaining witness, identified Appellant as one of those who had robbed him. He stated that one of the persons, whom he identified as Appellant, had a gun and a green towel. Officer Liptak testified that, at the time of the arrest of Appellant and his co-defendant Hawkins, Hawkins had a green towel and a gun. The Appellant testified (as did his co-defendant) that he did not commit the robbery and this testimony was corroborated by several witnesses, including Shuler. Shuler, who witnessed the robbery, testified that neither the Appellant nor the co-defendant was among those he saw commit the robbery. Thus, in short, the jury was faced with conflicting testimony which necessarily required it to accept Mr. Moon's identification of Appellant and to reject the testimony of the defense in order to find Appellant guilty. Accordingly, the court's instruction which directed that the testimony of a critical defense witness - Shuler - be re-

ceived with "suspicion and acted upon with caution" could not help but have had a devastating effect upon the jury in its determination of the identification issue.

The Challenged Instruction, When Applied to the Facts of This Case, Required That the Jury Consider Shuler's Testimony With Suspicion and Caution

No matter how one approaches the cautionary instruction given specifically in reference to the testimony of Shuler, one conclusion is inescapable: that instruction, when applied to the facts of this case, required that the jury consider Shuler's testimony "with suspicion and caution."

Under the instructions, if the jury concluded that Shuler was an informer and that he had a contingent interest in the outcome of the case, it had to treat his testimony "with suspicion and act upon it with caution":

> "If you determine from all the evidence that Shuler was, in fact, an informer, and that he had a contingent interest in the outcome of the case, then you should receive his testimony with suspicion and act upon it with caution."
> T. 551-552.

The undisputed facts required that the jury reach both conclusions.

Having earlier in its instructions used the term, "informer," without having defined such term (T. 550-551), the court stated to the jury immediately prior to the conclusion of its charge that an

informer, according to "Black's Law Dictionary," is:

> "'A person who informs or prefers an accusation against another whom he suspects of the violation of some penal statute.'" T. 567.

The undisputed testimony was that Shuler had given the Director of Security for D. C. Transit the "names and addresses of individuals which he thought were involved," in the subject robbery (T. 376,381), and the court below accurately recalled this fact to the jury in its challenged instruction (T. 550-551). Accordingly, the jury in the faithful observance of the court's instruction, had to consider Shuler an informer. Additionally, the jury had to conclude that Shuler had a contingent interest in the outcome of the case, because the undisputed testimony showed that Shuler had furnished names to Transit in hope of a reward (T. 382); indeed, the court in its instruction recalled for the jury "that the witness Shuler had implicated others in this crime, and that if these others were proven guilty, he would stand to benefit thereby" (T. 551).

There can be no doubt that the jury received Shuler's testimony "with suspicion and acted upon it with caution."

A. THE USE OF THE INFORMER INSTRUCTION TO DISCREDIT THE TESTIMONY OF A DEFENSE WITNESS IS A PERVERSION OF ITS PURPOSE AND SUCH USE DEPRIVES AN ACCUSED OF A FAIR AND IMPARTIAL TRIAL

It is perfectly clear from Fletcher v. U.S., 81 U.S. App. D.C.

306, 158 F.2d 321 (1946), wherein this Court required that the jury be admonished that an informer's testimony be received with suspicion and acted upon with caution, that it did so for the protection of the accused:

> "Granted that the credibility of the testimony of a paid informer is for the jury to decide, it nevertheless follows that when the entire case depends upon his testimony, the jury should be instructed to scrutinize it closely for the purpose of determining whether it is colored in such a way as to place guilt upon a defendant in furtherance of the witness's own interest. Here, admittedly, the usefulness of the witness -- and for which he received payment from the agent -- depended wholly upon his ability to make out a case. No other motive than his own advantage impelled him in all he did. * * * It is manifest * * * that it [the informer's testimony] should be received with suspicion and acted upon with caution." P. (Emphasis supplied).

While this Court observed that the "credibility of a paid informer is for the jury to decide," nevertheless it is plain that the Court was willing to invade the province of the jury to the extent of admonishing the jury to treat the testimony of such a witness with suspicion and caution because the Court believed it incumbent that the Court's knowledge of the strong possibility that an informer might testify falsely in order that his "employment" would not be terminated be passed on to the jury so the jury would weigh his testimony upon the basis which experience taught was the proper basis. Such invasion of the jury's role of determining the credibility of such witness is

permissible because it is clearly for the benefit of the accused.

But when a jury is instructed that a particular defense witness is an informer and it is directed to weigh his testimony "with suspicion and caution" because such witness had, at some point prior to testifying at the trial, given that same information to another in hope of a reward, such invasion of the jury's province is, we submit, prejudicially erroneous:

In the first place, the reasons which prompt a court, in the case of an informer who testifies against an accused, to impart to a jury via an instruction its knowledge of the dependability of such witness's testimony simply do not exist with respect to the testimony of a private citizen who has, prior to testifying for <u>either</u> the prosecution or the defense, given information regarding the crime to another in the hope of a reward: The private citizen's <u>livelihood</u> is not dependent upon "<u>turning up</u>" <u>crime</u> and <u>testifying</u> in support thereof, which is the basis of the court's conclusion that there is a strong possibility that an informer may testify falsely; and when such private citizen is testifying for the <u>defense</u>, the giving of such instruction cannot be predicated upon the fear of wrongfully convicting an innocent person by virtue of such testimony.

Secondly, and we believe more important, there is nothing in the fundamental nature and character of the American citizenry which will

justify a court in reaching two conclusions that must be reached if the giving of the cautionary instruction in the case of a private citizen who has furnished information in the hope of a reward were to be held proper: (1) that there is a strong possibility that the average citizen will give false information merely because a reward has been offered and he hopes to get it, and (2) that there is a strong possibility that the average citizen will thereafter testify falsely at a trial in his pursuit of that reward. Both conclusions are, in our opinion, absolutely contrary to fact.

Thirdly, the admonition that a particular witness's testimony be "received with suspicion and acted upon with caution" is a clear invasion of the fact finding province of the jury, but when such admonition is given with respect to a defense witness, it does not serve to benefit the accused -- which is why it is permissible when given with respect to a prosecution witness --, but, rather it works to

his detriment. 3/ Not only is such invasion erroneous, but it is prejudicially so because it casts a court-imposed doubt upon the truth of that witness's testimony, as it is designed to do when properly used, and it does so with a finality that cannot be overcome: There is, we submit, no possible means by which an accused can lift the veil of suspicion from such witness's testimony when the informer's instruction is given. 4/

Indeed, if such instruction were permitted to be given with respect to a defense witness, an accused who desired to avail himself of such testimony would be in a dilemma: He would be required, to his detriment, to use it upon the pain of having it received under a cloud of suspicion and distrust or he would be required, to his detriment, to forego that testimony. Cf. Luck v. U. S., 121 U.S. App. D. C. 151, 348 F.2d 763 (1965).

3/ Whether the court's characterization of Shuler as an informer (even though trial counsel had, in his examination of a witness, used the word, "informant," T. 372) is, standing alone, prejudicial error we do not pursue, except to note that the term carries with it a very odious connotation.

4/ An instruction to the effect that such testimony can be considered as untainted should the jury find it to be corroborated would, in our opinion, be prejudicially erroneous as affecting the obligation of the Government to sustain its burden of proving an accused guilty. Cf. State v. Reeder, ____ Mo. ____, 395 S.W. 2d 209 (1965) and Joseph v. State, 34 Tex. Cr. R.446, 30 S.W. 1067 (1895), infra. pp. 24-26.

Although we have found no case squarely on this precise point -- i.e., that it is prejudicially erroneous to instruct that the testimony of a defense witness who has previously furnished information in the hope of a reward may be considered as that of an informer and therefore should be received with suspicion and acted upon with caution -- there are several cases which we believe analagous and which, in our judgment, merit consideration on the point at issue. In the following cases, the courts considered the propriety of giving the cautionary accomplice instruction with reference to an accomplice who testified on behalf of the defense. That instruction also provides that such testimony shall be received with suspicion and caution. All found that the giving of such instruction in such circumstances was prejudicially erroneous.

In People v. O'Brien, 96 Cal. 171, 31 P. 45 (1892), the court reversed a lower court which had given the cautionary accomplice instruction with regard to the testimony of a witness who testified for the defense. The court stated:

> "The Code authorizes this instruction to be given on all proper occasions. [Code cited] But we do not think that this was a proper case for such an instruction, although it may be proper to give it in a case where the witness has been called by the people. [Code cited] It, in effect, told the jury not to believe the testimony of one of the defendants witnesses, -- at least, to discredit it. That is the meaning of the word 'discredit.' This the court had no right to do." P. 48.

The court then cited the California Constitution which forbade courts from charging juries with respect to matters of fact, and stated that the instruction it was considering was tantamount to expressing an opinion on a matter of fact.

A year later, the same court decided People v. Bonney, 99 Cal. 278, 33 P. 98 (1893). In that case the lower court had refused to give the accomplice instruction with regard to the testimony of an accomplice who had testified for the State. The State sought to sustain such refusal on the authority of the O'Brien case, supra. The court rejected the argument of the State, stating:

> "The principle upon which it was held in that case [O'Brien] that the court erred in giving the instruction made it error for the court to refuse the instruction in the present case. In that case the accomplice had been called as a witness on behalf of the defendant, and it was held that for that reason it was not a 'proper occasion' to give the jury this instruction, since it told the jury in effect to discredit one of the defendant's witnesses. For the court to discredit one of the defendant's witnesses before the jury is very different from giving an instruction in his favor. One of the chief principles in criminal jurisprudence wherever the common law prevails is not only that the accused shall be presumed innocent until the moment of his conviction, but also that every fact necessary to constitute the crime of which he is accused shall be established by the prosecution by evidence competent therefor, before he shall be called upon to establish his innocense. The State is interested in seeing that none of its citizens

> are unjustly convicted, and it is the duty of the court before whom the trial is held to protect the accused against a conviction by incompetent testimony, both in excluding such testimony and in giving to the jury proper instructions upon the evidence before them. If, however, the court assumes to discredit a witness which the defendant has called in support of his defense it deprives him of the constitutional guaranty of an impartial trial. And when the crime with which the accused is charged can be established only by means of the testimony of an accomplice, it is a 'proper occasion' for the court, in the discharge of its duty to protect the accused, to call the attention of the jury to the well-known fact 'that the testimony of an accomplice ought to be viewed with distrust.'" P. 99
> (Emphasis supplied)

The court held it was a "proper occasion" to give such instruction when the accomplice testified for the State.

In State v. Reeder, ___ Mo. ___, 395 S.W. 2d 209 (1965), the court reversed the lower court because the following instruction had been given with reference to the testimony of an alleged accomplice who testified for the defendant:

> "The court instructs the jury that though the testimony of an accomplice in crime, that is, a person who actually commits or participates in a crime is admissible in evidence, such evidence should be received by the jury with great caution, and the jury should be fully satisfied of its truth before they can acquit the defendant on such testi-

mony unless such testimony is corroborated by some person or persons not implicated in the crime." p. 210 5/

In reversing, the court said:

> "It is proper, in some instances, to give the type of instruction given here with the word 'convict' substituted for the word 'acquit' in the instruction, and when the witness accomplice has testified for the State. Here, however, witness Brown, the alleged accomplice, testified for the defendant. We, therefore, consider whether the giving of the instruction was error prejudicial to the defendant." p. 210 (Emphasis supplied)

The court held the instruction was prejudicially erroneous:

> "Here, the jury could reasonably have understood the instruction to mean that though the testimony of Brown was admissible in evidence, Brown's evidence should be received with caution, and that, unless Brown's testimony was corroborated by some person or persons not implicated in the crime the jury should be fully satisfied of the truth of Brown's testimony before they could acquit defendant. Bobby Lee Mcjaha testified for defendant but there is some question as to whether his testimony did or did not corroborate Brown's testimony. In any event, the instruction clearly and erroneously shifted the burden of proof from the State to defendant."

5/ Compare the following language of the challenged instruction in the instant case:

> "You should scrutinize it closely to determine whether it is colored in such a way as to cause doubt concerning the guilt of the defendants in this case, ***" T. 551.

It may be noted, at least parenthetically, that the court below recognized that the standard informer instruction "is not, as written, applicable to this case" but "that a certain amount of revision would cure that" (T. 475). The underscored language reflects the court's attempt to "cure" the following language of the Fletcher case, supra, which required that the cautionary instruction be given when the informer testified for the Government: "*** the jury should be instructed to scrutinize it closely for the purpose of determining whether it is colored in such a way as to place guilt upon a defendant in furtherance of the witnesses own interest."

> " * * * when * * * the presumption of innocence of an accused is violated and the jury in effect insturcted that the burden of proving his innocence is on the accused, the accused has been deprived of a fair and impartial trial." p. 211 (Emphasis supplied)

In Joseph v. State, 34 Tex. CR. R.446, 30 S.W. 1067 (1895), the court held that the giving of the accomplice instruction was erroneous when given with respect to a defense witness. In that case two accomplices testified, one for the State and one for the defense. The trial court gave the cautionary accomplice instruction with respect to both witnesses, although all of the testimony of the one accomplice had been favorable to the defendant. The court admonished the jury that, if the State were relying "in any measure" upon the defense accomplice witness, the jury was to discredit such testimony to the extent of requiring corroboration before it could convict.

In reversing, the court said:

> "While this might be true as an abstract proposition, yet, without a pertinent charge telling the jury in this connection that the same rule did not apply to said witness where her testimony was in favor of the defendant, it was liable to mislead and confuse the jury, and to discredit said witnesses when they should come to discuss her testimony. Under such a charge they were liable to regard the same rule applicable to the State as equally applicable to the defendant, and to require that she be corroborated before they would be authorized to acquit the defendant upon the testimony of said witness alone. We believe that the charge was erroneous as to said witness." p. 1068-1069 (Emphasis supplied)

The foregoing cases demonstrate that it is prejudicial error to give the accomplice cautionary instruction when such a witness has testified for the defense.

We submit that the objections to giving a cautionary instruction with respect to an accomplice who testifies for an accused which are noted in the foregoing decisions are equally applicable to the giving of the cautionary informer instruction with reference to the testimony of a defense witness who has previously given information in the hope of a reward. Whether the instruction should not be given because such instruction is simply inappropriate in that the reasons to be suspicious of the testimony of an informer testifying against the accused do not in fact exist with respect to the testimony of a private citizen who had previously given information in the hope of a reward and who testifies for the defense, or because it may be deemed to impair the presumption of innocence 6/ or to affect the obligation of the government to carry the burden of proof 7/ or because it may be deemed to frustrate "the cause of truth" by virtue of the accused "foregoing that opportunity [to put his story before the jury] because of the fear of prejudice founded upon" the effect

---

6/ People v. Bonney, supra.
7/ State v. Reeder and Joseph v. State, supra.

of such instruction, 3/ it is manifest that ar accused's whole case is hurt by it. Without question, the testimony of the particular witness is downgraded; but, that is not the whole of it: the distrust of that witness is bound to affect the jury's consideration of any other defense testimony and of the accused himself for having put on the witness stand a person who is, by court pronouncement, not to be trusted.

We respectfully submit that this Court should hold, as a matter of law, that the giving of the challenged instruction was prejudicially erroneous.

B. UPON THE FACTS OF THIS CASE IT WAS PREJUDICIALLY ERRONEOUS TO HAVE GIVEN THE CHALLENGED INSTRUCTION

It was, we submit, prejudicially erroneous to have given the challenged instruction under the facts of this case.

Not only are the considerations which require the cautionary instruction to be given on a proper occasion absent in the case of one who has given information in hope of a reward and who thereafter testifies for the defense, as we have previously shown, but the particular circumstances under which Shuler appeared and testified showed clearly that his testimony at the trial had not been motivated

---

3/ Luck v. United States, supra.

by the hope of reward even though he had, at a point prior to the trial, given the information to Transit in hope of a reward. 9/

The following facts are not subject to dispute: (1) that Shuler existed, had witnessed the robbery and had advised D. C. Transit of the names of person he saw commit the crime then being tried became known to the defense only during the trial as a result of information obtained by trial counsel from the files of D. C. Transit; (2) that contact with Shuler was then made by trial counsel; and (3) that Shuler's appearance at the trial and his testimony therein was the result of trial counsel having sought him out.

In view of the foregoing facts, no reasonable person could infer from the fact that Shuler has previously given the information to Transit in hope of a reward that his appearance and testimony at the trial were motivated in any way by hope for a reward: those facts are simply not compatible with conduct one would normally expect of a person who was hotly pursuing the goal of a reward and from which

---

9/ Cf. Wynn v. United States, ___ U.S. App. D. C. ____ (Nov. 16, 1967), wherein this Court stated:

> "Appellant's effort was to show Robinson's animosity as a possible explanation, not for the report he made to the police, but for the damaging testimony he gave at the trial. Robinson's emotional bent on the witness stand, and not at some point prior to the offenses, constituted the important subject for investigation." (Slip Op., p. 4, emphasis supplied)

conduct one might infer that his testimony was colored. And, with the sole exception of the single fact that the information had been given to Transit in hope of a reward, nothing Shuler or any other witness testified to at the trial provided a basis for inferring that Shuler's testimony at the trial was motivated by the hope of reward. It is to be remembered that the only testimony in the case which referred to Shuler having given the information to Transit in hope of a reward was that of the Transit Security Officer (T. 382). Not one question was asked by the government attorney of Shuler which was designed to elicit from Shuler whether he was testifying at the trial in hope of a reward. Trial counsel had elicited from Shuler the fact that Shuler knew Appellant and the co-defendant only slightly (T. 239-240) and that, prior to the discovery of his existence by trial counsel, Shuler had never talked with trial counsel (T. 243), obviously for the purpose of showing that Shuler had no interest in the outcome of the case. The government attorney's efforts to show that Shuler had an interest in the outcome of the trial were aimed at, and were limited to, Shuler's friendship, if any, with the defendants (T. 244-247), and whether Shuler, himself, had been a participant in the crime (T. 261).

Thus, the fact that Shuler had given the information to Transit in hope of a reward was the only fact from which the jury could infer that he was testifying at the trial in hope of a reward; otherwise, the record was absolutely barren of any evidence from which one could infer that he was testifying at the trial in hope of a reward. Since the circumstances under which Shuler appeared at the trial were, we submit, so utterly inapposite to those which one could reasonably expect to surround the appearance of a person whose ultimate purpose for testifying was the obtaining of a reward, no person could, upon the record below, reasonably infer that Shuler's testimony at the trial was "colored" by the hope of a reward. It was, we submit, prejudicially erroneous to have discredited Shuler's testimony by instructing the jury that, because he had given information to Transit in hope of a reward, the jury was required to receive his testimony with "suspicion and to act upon it with caution."

Indeed, that Shuler had given the information to Transit in the hope of reward was too remote to justify the court in giving any instruction which singled Shuler out for individual consideration by the jury on account thereof. If that fact could possibly be considered as giving Shuler an interest in the outcome of the case, the general instruction given by the court which related to the interest

of any witness in the outcome of the case (T. 548) was adequate.

We respectfully submit that, upon the particular facts of this case, it was prejudicially erroneous for the court to have instructed the jury to receive Shuler's testimony "with suspicion and to act upon it with caution."

II

THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANT IN ADMITTING INTO EVIDENCE A TOWEL AND GUN (GOVERNMENT EXHIBITS 1 AND 2) IN THAT THESE ITEMS WERE THE PRODUCT OF AN ILLEGAL SEARCH AND SEIZURE.

Appellant respectfully refers this court to the third statement of points and the argument thereto in the Brief for Appellant Everett A. Hawkins, Jr., Docket No. 21,291, which Appellant adopts herein.

The admission into evidence of the illegally seized gun and towel constituted prejudicial error with respect to Appellant. McDonald v. United States, 335 U.S. 451, 93 L.Ed. 153, 69 S.Ct. 191 (1948); Nelson v. United States, 93 U.S. App. D.C. 14, 208 F.2d 505 (1953); Hair v. United States, 110 U.S. App. D.C. 153, 289 F.2d 894 (1961); Schoeneman v. United States, 115 U.S. App. D.C. 110, 317 F. 2d 173 (1963).

This error requires that Appellant's conviction be reversed and the case remanded with instructions to the District Court to grant Appellant a new trial.

CONCLUSION

For the reasons stated the judgment of the District Court should be reversed.

Respectfully submitted,

Robert M. Scott
1250 Connecticut Avenue, N.W.
Washington, D. C. 20036
Counsel for Appellant
(Appointed by this Court)

James C. Demas
1250 Connecticut Avenue, N. W.
Washington, D. C. 20036
Counsel for Appellant

Gall, Lane and Powell
of Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief for Appellant was personally delivered to David G. Bress, Esquire, United States Attorney, Washington, D. C., and Frank C. Nebeker, Esquire, Assistant United States Attorney, United States Court House, Washington, D. C., this _____ day of December, 1967.

_____

Robert M. Scott

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,108

CLIFTON H. WINSTON, JR., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 21,291

EVERETT A. HAWKINS, JR., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
ALBERT W. OVERBY, JR.,
Assistant United States Attorneys.

Cr. No. 899-66

QUESTIONS PRESENTED

In the opinion of appellee, the following questions are presented:

1) Whether there was error in refusing to suppress a pistol, towel and ammunition clip recovered from appellant Hawkins when both appellants were arrested (1) pursuant to on-the-scene descriptions given by the victim of the robbery to a police officer; (2) appellants' descriptions fitted those given the arresting officer, including the towel that one of them was reported to have used in covering the pistol used in the robbery; (3) appellants were sighted two or three blocks from the scene of the crime trotting away from it, within "two or three minutes" after it was committed?

2) Did the trial court err in instructing the jury that a defense witness characterized by both counsel and a defense witness as an informant and who would be remunerated if persons he had named as perpetrators of the robbery, none of which included appellants, were tried and convicted, could be found by them to be an informer, or even if he was so found, that his interest in the outcome of the trial could be so remote as to call for no particular suspicion or caution in assessing his testimony? If so, was not the error harmless in the light of the strong evidence against appellants and since in any event the jury properly rejected the testimony of the witness as inherently incredible?

3) Did the trial court err in denying appellant Hawkins' motion for judgment of acquittal, when appellant was arrested within minutes of the robbery, trotting away from it in the company of a man identified as a perpetrator thereof, two or three blocks from the scene and at a location consistent with the direction which the robbers were said to have taken, with the aforementioned items concealed in a distinctive towel in his possession; and in addition, his own testimony placed both appellants at the scene of the robbery?

INDEX

	Page
Counterstatement of the Case	1
A. The Motions to Suppress	2
B. The Government's Case	4
1. The Testimony of the Bus Driver	4
2. The Testimony of Officer Liptak	6
3. The Testimony of Detective Sanders	7
4. The Continued Cross-examination of Mr. Moon	8
C. The Defense	9
1. The Testimony of Tyrone Schuler	9
2. The Testimony of Ethel Webster	13
3. The Testimony of Diane Lee	14
4. The Testimony of Appellant Winston	15
5. The Testimony of Edward Hughes	16
6. The Testimony of Other Defense Witnesses	18
7. The Testimony of Appellant Hawkins	19
D. Post-Testimony Proceedings	20
1. The Bench Conference	20
2. The Instruction	23
Statutes and Rule Involved	23
Summary of Argument	24
Argument:	
I. An instruction that a defense witness characterized as an informant and who would be remunerated if persons not appellants were tried and convicted could be found by them to be an informer, but that if his interests were found to be remote, no particular suspicion or caution would be called for does not necessitate reversal	26
A. The trial judge did not err in giving the instruction	26
B. Assuming *arguendo* that the instruction given was erroneous, only harmless error resulted	29
II. There was no error in failing to suppress items recovered from appellants since arrests were based on probable cause	30
III. The trial judge did not err in denying appellant Hawkins' motion for judgment of acquittal	32
Conclusion	37
Appendix A	39

TABLE OF CASES

	Page
Aikens v. *United States*, 98 U.S. App. D.C. 66, 232 F.2d 66 (1956)	36
**Bailey et al* v. *United States*, D.C. Cir. Nos. 20,623, 20,624, 20,625, and 20,729, decided December 14, 1967	31, 32, 35
**Bullock* v. *United States*, 81 U.S. App. D.C. 271, 157 F.2d 702 (1946), *cert. denied*, 330 U.S. 829 (1947)	36
Campbell v. *United States*, 115 U.S. App. D.C. 30, 316 F.2d 681 (1963)	35
Crawford v. *United States*, —— U.S. App. D.C. ——, 375 F.2d 332 (1967)	32
**Davis* v. *United States*, 230 A.2d 485 (D.C. Ct. App. 1967)	32
Fletcher v. *United States*, 81 U.S. App. D.C. 306, 158 F.2d 321 (1946)	29
Gatlin v. *United States*, 117 U.S. App. D.C. 123, 326 F.2d 666 (1963)	32
Goodwin v. *United States*, 121 U.S. App. D.C. 9, 347 F.2d 793, *cert. denied*, 382 U.S. 920 (1965)	32
**Harris* v. *United States*, 367 F.2d 633 (1st Cir. 1966), *cert. denied*, 386 U.S. 915 (1967)	28
Hoffa v. *United States*, 385 U.S. 293 (1966)	28
**Shettel* v. *United States*, 72 App. D.C. 250, 113 F.2d 34 (1940)	28
**United States* v. *Meisch*, 370 F.2d 768 (3rd Cir. 1966)	28
Williams v. *United States*, 113 U.S. App. D.C. 371, 308 F.2d 326 (1962)	31

OTHER REFERENCES

22 D.C. Code § 502	23
22 D.C. Code § 2901	23
22 D.C. Code § 3204	23
18 U.S. Code § 5010(B)	2
Rule 52(a), Federal Rules of Criminal Procedure	24

---

*Cases chiefly relied upon are marked by an asterisk.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,108

CLIFTON H. WINSTON, JR., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 21,291

EVERETT A. HAWKINS, JR., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On June 30, 1966 a robbery of a D.C. Transit Company bus driver occurred at the corner of Thirteenth and D

Streets, N.E. Within a matter of minutes, appellants Hawkins and Winston were arrested three blocks from the scene of the robbery. On July 19, 1966 appellants were indicted for robbery and assault with a deadly weapon (counts 1 and 2 of the indictment). Count three of the indictment charged appellant Hawkins with carrying a dangerous weapon, and count four charged appellant Winston with the same crime. They pled not guilty on July 29, 1966. On April 4, 1967 appellant Hawkins filed a motion to suppress which was heard and denied on April 19, 1967. The four-day joint trial before Judge Gasch began on April 19, 1967 and on April 25, 1967 the jury returned a verdict of guilty as charged as to both appellants. On May 12, 1967 appellant Hawkins' motion for judgment notwithstanding verdict or in the alternative for a new trial was argued and taken under advisement. In a Memorandum Opinion of June 6, 1967 Judge Gasch denied the motion.

On June 9, 1967 appellant Hawkins was sentenced pursuant to 18 U.S.C. § 5010(B), the Federal Youth Corrections Act. The same day, appellant Winston's sentence was suspended and he was placed on probation for a period of 5 years. This consolidated appeal followed.

A. The Motions to Suppress

At a pre-trial hearing to suppress, the arresting officer was called on behalf of appellant Hawkins. He testified that he was also the first officer to arrive at the scene of the robbery of the bus driver at the corner of Thirteenth and D Streets, N.E. (H. Tr. 4, 5). Three persons had been involved in the robbery (H. Tr. 6). The driver described one of the men who entered the bus as wearing "a light colored shirt and dark pants" and that a second man had a green towel with which he concealed a pistol (H. Tr. 6-7). The officer then combed the area in the direction in which the three robbers had run (H. Tr. 7). Two or three minutes after the robbery, the officer spotted two subjects running across Thirteenth Street two blocks away,

in the area of Lincoln Park (H. Tr. 8-9).[1] According to the officer, "Winston, who the appellant Hawkins was with, fitted the description as far as the height and the clothing . . . . About five eleven, light colored shirt and dark pants" (H. Tr. 8). Apppellant Hawkins was in his company, carrying a green towel in his hand (H. Tr. 7, 12). When asked where they were running from, the two men said they were "just running". Appellant Hawkins took the stand. He admitted that he was in the area at the critical time and was "trotting across the street" with what he believed to be a blue towel, the possession of which he explained by saying "I hadn't been home and I usually keep a towel when I get to sweating" (H. Tr. 14-15). After brief arguments from counsel, the motion to suppress was denied (H. Tr. 23).

At trial, the motion to suppress the items—the green towel, the pistol, a clip of ammunition and a paper bag in which the clip was contained—was twice renewed (Tr. 114-15, 179-180). This contention was rejected (Tr. 180). The factual background for this ruling was as follows: Officer Liptak, the arresting officer, again testified that he was in the first vehicle to arrive at the scene and that he was given a description of the robbers (which he did not reduce to writing) (Tr. 50-51, 107). He testified that he saw appellants after having circled Lincoln Park and started up Thirteenth Street back toward the scene of the robbery, and that "they sort of walked fast or did a little run like towards—across North Carolina Avenue there as we approached them" (Tr. 111). Hawkins was carrying in one hand a green towel "folded in half and seemed to be there was something inside the towel the way he was carrying it. . . . he had a hold of something that was inside the towel. . ." (Tr. 112). When asked why he stopped appellants, he responded:

> Well, when I am talking to the bus driver at the scene of the robbery at 13th and D, I received infor-

[1] Actually the distance from the scene of the crime to the arrests was about three blocks. See text, *post*.

> mation that one of the subjects, the one on the bus, had a towel in his hands that concealed a pistol that was used in the holdup.
>
> Also the fact that the physical description of one of the subjects that was involved in the holdup fitted the defendant Winston. (Tr. 113)[2]

He took the towel and found inside of it the aforementioned items (Tr. 113). The arrest occurred "two or three minutes" after the holdup (Tr. 118). The arrest occurred " a[b]out three blocks" from the scene of the robbery (Tr. 129).

B. The Government's Case

1. *The Testimony of the Bus Driver*

Warren Moon, a bus driver with the D.C. Transit Company, was the government's first witness. On the night of June 30, 1966, at about 10:30 p.m. he had parked his bus on a "layover" at the corner of Thirteenth and D Streets, N.E. There, as he succinctly put it, "I was robbed." (Tr. 22). He testified that a man stepped on ths bus and asked if he went to Georgetown and that he told him he could do so by transferring to a Number 38 bus. He had "no more gotten the words '38' out of [his] mouth when this [second] young man stepped up on the bus behind [him] and stuck a gun in [his] face and [said] 'Give me your money and make it fast'" (Tr. 23). The young man with the gun had a green cloth or rag over his arm, which he pulled back to reveal the gun (Tr. 23). He had on "a light-colored pullover, something like a T shirt type shirt, and dark colored trousers" (Tr. 24). The first man had on long pants (Tr. 24).[3] The first per-

---

[2] The first man to board the bus had been described as 18 or 19 years of age; the second man had been described as "light skin, light colored shirt, dark pants, and bulging eyes, or something. He stated that to me" (Tr. 121).

[3] Initially, Moon testified that the first man had on a dark shirt and plaid shorts, but he then said "[W]ait a minute. The first one had on long pants. I think he had on long pants. I was concentrating on that gun" (Tr. 24).

son that got on the bus took $40 in bills from him, while the second person unsuccessfully tried to snatch the change carrier, which had a safety chain on it (Tr. 25, 28). Moon saw a third person standing "right at the door" at the door of the bus, but he could only see his feet (Tr. 26). The three all ran away together, west on D Street and in the opposite direction from which the bus was facing (Tr. 26-27). According to the witness, there was a street light there and the lights were on in the bus (Tr. 27).

After the three left, Mr. Moon went across the street to a delicatessen and called the company dispatcher, who in turn called the police. By the time he had finished his call, Officer Liptak and his partner were there (Tr. 28-29). As indicated above, the witness described the men to them (Tr. 50-51). "About ten or twelve minutes after the robbery at the most", appellants were brought back in the police vehicle (Tr. 29-30). The witness testified that he recognized appellant Winston. When asked if there was anything unusual or distinctive about him, Moon said that he would never forget appellant Winston's eyes, which were unusual in that "The upper part instead of going sort of normal, they sort of get an oval shape to them and they are more or less protruding". He identified appellant Winston in court, but said he did not recognize appellant Hawkins (Tr. 30-31). Appellant Winston was the man who held the towel and the gun (Tr. 32).

On cross-examination, the witness described the first man to get onto the bus as five feet eleven inches tall, wearing a dark shirt and a pair of light tan khaki pants (Tr. 62-63). He did not pay close attention to the man because he was concentrating more on the gun (Tr. 64). He testified that the first man or the third man had on a pair of shorts, but he was "not exactly sure" which one did. (Tr. 66). The second man got off the bus first ("because Number Three wasn't on the bus") and "Number Two went right behind him, and then Number One right behind Number Two" (Tr. 72).

According to Moon, he thought the second man had a hat on "something like a sailor cap turned down" (Tr. 80-81). It was a light-colored cloth hat (Tr. 81). He thought that the second man had dark brown eyes (Tr. 81). The witness indicated that the robbery took about a minute (Tr. 82). He estimated that the call to the dispatcher took three or four minutes, and reiterated that the police had already arrived on the scene when he exited from the delicatessen (Tr. 84-85).

2. The Testimony of Officer Liptak

Officer Liptak went to the scene after receiving a radio run from the police dispatcher. He received information from Mr. Moon which caused him to patrol the surrounding area (Tr. 107-09). Armed with descriptions of the two men, the towel one carried (see Part A of this Counterstatement), and the fact that the suspects had run west on D Street, he drove west on D Street, turned left onto Twelfth, proceeded south and then circled Lincoln Park, getting back onto Thirteenth Street (Tr. 123-25). As he proceeded north on Thirteenth, he saw appellants proceeding south across North Carolina Avenue (Tr. 111). As noted above, appellants "sort of walked fast or did a little run like towards—across North Carolina Avenue" as he approached them (Tr. 111). Since Winston's appearance fitted the description given the officer by the bus driver, and he knew that one of the suspects had used a towel in the holdup, he stopped them (Tr. 112-13). According to the officer, the arrest occurred two or three minutes after the robbery (Tr. 117-18). Appellants were taken back to the scene of the robbery, "about three blocks" from where they were arrested (Tr. 117, 129). Mr. Moon positively identified Winston, but said he "wasn't sure" as to Hawkins (Tr. 30-31, 117, 129, 135-36). The officer identified both Hawkins and Winston in court as the persons he arrested (Tr. 110). He also identified the towel that appellant Hawkins had been carrying; the pistol that had been contained in it; the paper

bag that had also been inside the towel, and the ammunition clip that had been in the paper bag (Tr. 112, 113-14, 115-16). He testified that neither of the descriptions of the first and second man had contained any reference to short pants (Tr. 136-37, 170).[4]

3. *The Testimony of Detective Sanders*

Detective Sanders was called to the stand with the jury absent to clear up the record with regard to Jencks Act material (Tr. 185). He investigated the robbery and took in writing a description of the parties involved for the purpose of broadcasting a lookout (Tr. 186-87). The lookout was

> ". . . for three Negro males: Number One . . . was a Negro male between the ages of 16 to 17, five feet eight, 140 to 145 pounds, complexion very dark . . . , wearing gray trousers, white sport shirt;
>
> Number Two, Negro male, 16 to 17 years of age, five ten, 150 to 160 pounds, . . . armed with a revolver, . . . wearing a white T shirt with a towel wrapped around his neck;
>
> Number Three was a Negro male wearing plaid shorts, no further description (Tr. 188).

The detective testified that the only thing he took down was the flash lookout (Tr. 189). He testified in the jury's presence that he talked with other persons in the area after the robbery, but did not recall interviewing a Tyrone Schuler, that he didn't think Hawkins was wearing plaid shorts when he was brought back to the scene; that he did not receive from Mr. Moon the names of any possible witnesses; and that he did not recall what appellant Winston

---

[4] At this point, the officer was asked if he had ever seen Tyrone Schuler, who was brought into the courtroom, shortly after 10:30 p.m. on June 30. He said that he'd seen him on several occasions, but could not recall whether he saw him on that occasion or not, and that he did not recall discussing the case with the man on the evening of July 1st (Tr. 175-76, 179). At the conclusion of the officer's testimony, it was stipulated that neither appellant had a license to carry a gun (Tr. 182-83).

was wearing when he was brought back (Tr. 222, 224, 225, 226).

4. *The Continued Cross-examination of Mr. Moon*

The bus driver was recalled for further cross-examination. He was asked if he had a conversation shortly after 10:30 p.m. on the night of the robbery with a young man standing in the courtroom, to which he replied "He looks like the person—I cannot say for sure now—but he looks like the person that asked me if I went to Georgetown" (Tr. 198). He was then asked if he had a conversation after the incident as to what he observed during the course of the robbery, to which he replied that he had only talked to a passenger who had been on the bus (Tr. 198, 199).

Mr. Moon said he was within earshort of Detective Sanders when the descriptions were radioed to headquarters (Tr. 260). He agreed with the description of the first suspect. He disagreed with respect to the description of the second suspect insofar as he indicated that the towel was not around his neck, and added that he thought the second man had on "a light colored shirt, something like a T shirt" (Tr. 203). He agreed with the description of the third man, but said "but that was about a year ago and I couldn't remember all of this stuff right off like that. . ." (Tr. 204). He then testified that he had made out a company report of the robbery. When asked if the name Tyrone Schuler was contained therein, he said he didn't remember the man's name and that he had only discussed the robbery with a tall individual on the bus, whose name he could not remember, but who wore "awful thick glasses" (Tr. 205-06, 209, 210). He reiterated that the young man who had been brought into the courtroom "looked like the man that asked me if I went to Georgetown" (Tr. 211).

With this testimony the government rested (Tr. 212). A motion for judgment of acquittal, the basis of which was that the jury would be required "to do great specula-

tion on the issue of identification" was made and denied as to both appellants (Tr. 212-14, 217, 218).

C. The Defense

1. *The Testimony of Tyrone Schuler*

Before the witness began his testimony, the Court noted that the bus driver had identified him as one of the robbers and advised him of his Fifth Amendment rights (Tr. 228). He testified that he had talked to Officer Liptak and Mr. Moon on June 30, 1966 (Tr. 231, 237, 242, 244, 253, 254, 256, 259).

According to the witness, he was "leaning on . . . a beauty salon wall" at Thirteenth and D Streets when he saw three boys on the bus (Tr. 231-32). One "was standing on the platform on the bus and the second one was standing on the second step on the bus with a gun in his hand and the third one had his foot in the door" (Tr. 232). The first one was said to be wearing a white jacket; the second ("brown skinned") one had a gun "[s]imilar to" the gun recovered from appellant Hawkins and was wearing "a white jacket with a collar up, pair of brown khakis"; the third one "had a white jacket on, pair of Bermuda shorts, plaid, [and a] pair of . . . low cut shoes, looked similar to a sandal" (Tr. 234). None of them wore hats (Tr. 234). They ran through the alley toward C Street, after which Mr. Moon left the bus and made a phone call (Tr. 235-236). When he returned, the witness claimed to have told the bus driver his name, after which he received from the driver an "application" (Tr. 236, 237). The witness did not fill it out (Tr. 237). He claimed to have told Officer Liptak his name and address as well (Tr. 237). Schuler also claimed to have been contacted by a private investigator for the D.C. Transit Company, who asked him to come to the terminal at 15th Street and Benning Road (Tr. 238). He asserted that he told the investigator that he knew two of the boys (Tr. 239).

He then testified that neither Winston nor Hawkins was one of the persons he saw; that he had given an officer from the Second Precinct the names of persons he thought he had seen robbing the bus; that he never palled around with Winston or went to school with him, but that he thought he had seen him playing basketball on a school playground (Tr. 239-240, 244). He had seen appellant Hawkins at "dances, basketball, things" but they had never spoken to each other (Tr. 243-44).

Schuler testified that he was asked to go down to the D.C. Transit Company offices several times, three times in connection with the instant robbery (Tr. 241).[1] He testified that the police officer knew that he had seen the robbery "[b]ecause [he] had talked to the bus driver and the police and the bus driver turned [his] name in" (Tr. 242).

On cross-examination, he testified that he had seen Winston once playing basketball one or two years ago and that he remembered him "because when he shot the ball a boy gained it and I think the boy bust his nose or something that day" (Tr. 245). He said he had seen appellant Hawkins "quite a few places", including the Howard Theater and on a playground on Third Street Southeast (Tr. 247). Schuler said he was in the vicinity when the holdup occurred because "It was on a Friday and [the boys] always go to dances on Friday, Saturday and Sunday" (Tr. 247). On the night in question, however, "They was (sic) over on . . . Emerald Street and I had . . . asked a friend of mine to go down there and tell the boys to come on by because I was ready to go. We was (sic) all going to a party but first I had to go home" (Tr. 248). The friend, Howard Bradshaw was a block away when

---

[1] Apparently, Schuler had been there "about two robberies" in which "they had said [he] was a witness" (Tr. 241). He said he had talked to the same man each time, and that he thought his name began with a "C" (Tr. 241). The first robbery, at 8th and C Streets, N.E., had taken place two or three months before the instant robbery, and had involved two instead of three participants (Tr. 260, 261).

the robbery occurred, and he didn't come back (Tr. 249). The following exchange then occurred:

> Q. So he was gone . . . before the robbery took place, is that right?
> A. Yes, sir. The robbery was taking place while I was walking down the street and I stopped.
> Q. I thought you said you were standing near the wall of the beauty salon?
> A. I was.
> Q. Now you are saying it took place while you were coming down the street?
> A. It was.
> Q. Well, were you—
> A. When I was coming down the street the boys were just getting on the bus.
> Q. How close were you to the bus when they got on the bus?
> A. About two feet.
> Q. What did you do then?
> A. I was standing there waiting for the boys to come off Emerald Street?
> Q. Come off what?
> A. Come off Emerald Street.
> Q. Were you near the entrance to the bus when the boys got on the bus?
> A. I was standing about—
> Q. You just said you were two feet from bus. Was it on the side where the entrance is?
> A. Well—
> Q. The front door?
> A. Yes.
> Q. Did you make any effort to help the bus driver?
> A. No, sir.
> Q. What did you do when they got on?
> A. Stood there.
> Q. You just stood there near the beauty salon?
> A. Yes, sir.
> Q. Did you make any attempt to call the police or call for help?
> A. No, sir.
> Q. Was there anybody else around there?
> A. I didn't see anybody. I was laughing.

Q. You were what?
A. Laughing.
Q. You were laughing while the robbery was going on?. . . .
A. It was funny because the man was stumbling and shaking and I just started laughing.
Q. You say you were laughing all the way through while this took place?
A. No, sir. After the boys got off the bus and they was running up the alley and the bus driver he was knocking things, trying to get off the bus.
Q. What were you doing at that time?
A. Standing there.
Q. You mean even after the robbers left you made no effort to help the bus driver, did you?
A. I didn't have nothing to do with it.
Q. How long did the robbery last, Mr. Schuler?. . . .
A. Last about two or three minutes. (Tr. 249-52).

The witness explained that he didn't get involved in the robbery "because if I would have got shot what could they have given me" (Tr. 262). The Court asked how the witness could see the gun in the second man's hand through his back, to which the witness answered "No, sir. . . . They have windows on the bus" (Tr. 262-63).[8] The witness testified that a teenager he had seen before "up at the skating rink" was seated by the back door of the bus, from which he exited during the course of the robbery (Tr. 253). He also said that the bus driver used a phone "on the side of the Safeway" in the middle of the block of D Street between Thirteenth and Tennessee Avenue and on the opposite side from which the bus was parked (Tr. 257-58).

Schuler testified that he remained at the scene of the robbery for about five minutes after it occurred, during which time he talked to the bus driver and the police officer. He continued:

---

[8] Schuler concluded his testimony with a description of the flight of the robbers. "But two, you know, *because one was already gone*, because he had turned, ran up towards 12th Street, and then turned down the alley towards C" (Tr. 266) (emphasis added).

A. After I talked to the police he went back and talked to the bus driver.

Q. Then he talked to you first?. . . .

A. No, sir.

Q. Tell us what the police officer did.

A. First he stopped and pulled up and then he—when the bus driver stopped talking . . . and pointed to me and the police started asking me questions and then he went back and started talking to the bus driver (Tr. 259).

After testifying that he was not there when Hawkins and Winston were brought back, he testified that the police officer just asked him his name, then said that the police officer also asked him to describe the robbers (Tr. 259). He denied that he was the first boy on the bus that night and denied having robbed the bus driver (Tr. 261).

2. *The Testimony of Ethel Webster*

Miss Webster, who had known appellants Winston and Hawkins about a year and a half and six or seven years respectively, testified that on June 30, 1966, after 10:00 p.m., she was walking with her baby when she saw them at the corner of 13th and D Streets, about a block from where she lived (Tr. 311-313, 316). The three of them stood on the corner, "talking a little bit". Diane Lee joined them. They talked about 15 or 20 minutes about 12 feet from the bus stop (Tr. 317). Hawkins had a towel around his neck but nothing else in his hands (Tr. 315-319). During this time, a police car pulled up in front of the bus and a crowd gathered (Tr. 313-314). They all walked across the street in front of the bus and up 13th Street (Tr. 314). When they crossed the street there were more people at the bus stop than usual. She saw the bus driver outside of the bus. The witness, "Diane and the baby and a few more girls . . . stood right there talking and [appellants] walked on down the street". As near as she could remember, Hawkins stayed at the scene two or three minutes (Tr. 319). Appellant first stopped to talk to someone, then "kept straight down 13th

him about fixing her washing machine [for] . . . [a]bout three or four minutes. . . [t]hen we walked on up 13th Street" (Tr. 357-58).

Appellant Winston described the arrest, said he saw the gun for the first time at the police station, had nothing to do with the robbery, and saw Mr. Moon for the first time in court (Tr. 359-60; compare Tr. 356).

On cross-examination, Winston claimed to have met his cohort at the carry-out at 8:00 p.m., after which they played pinball for two hours (Tr. 362-63). Although there were "a lot of people" at the carry-out, Winston could not recall having seen anyone there that he knew (Tr. 363). He knew the owner, but appellant claimed "he doesn't run it any more" (Tr. 363). He testified that he did not see any kind of paper bag, that he was not carrying anything, and that he didn't notice any passengers on the bus and did not see the robbery (Tr. 365). At the time he walked in front of the bus, a foot or two away, "a car was in front of the bus". Asked if he saw any officers in the car, he replied "No, I didn't notice. They had got out. I didn't notice" (Tr. 366).

Winston did not know the name of the woman Hawkins had spoken to about the washing machine,[7] and he did not know a "Francene" (Tr. 366). He knew Claudette Bradshaw, but did not remember seeing her that evening (Tr. 367). He claimed to have seen the gun for the first time when it was pulled out of a paper bag at the station by one of the arresting officers (Tr. 369). Appellant did not see the officer with the bag when the arrest occurred. (Tr. 369.)

5. *The Testimony of Edward Hughes*

Mr. Hughes, Director of Security for the D.C. Transit Company, testified that he met Tyrone Schuler on one occasion—September 7, 1967 (Tr. 372-74). As a result of

---

[7] Winston claimed there were "about three" women on that front porch (Tr. 367-368). He did not know the names of any of them (Tr. 368).

a call from one of his operators at the Trinidad Division of the company, located on Benning Road, Hughes went there the same day and talked with Schuler, who gave him names and addresses of approximately six names, none of which were appellants' (Tr. 375-76, 378-81). This information was given to Detective Linn of the Robbery Squad the following day (Tr. 379-80). He estimated that Schuler was "a young person . . . about 16" (Tr. 378).

On cross-examination, the witness testified that the company gave monetary rewards for information, and that Schuler was aware of this, as the possibility of a reward had come out in the course of the interview (Tr. 382).[8] The witness testified that to his knowledge, there were no other cards bearing Schuler's name in the company files (Tr. 382). Before September 7, Hughes had received no information concerning the robbery (Tr. 386-87).

At a bench conference called in connection with Hughes' testimony, the following exchange occurred:

> THE COURT: Of course, one aspect of this is I suppose now in view of this man's testimony, I have got to give the informer instruction respecting the testimony of Shuler (sic), if the defense has characterized him as an informer.[9]

---

[8] In response to a question by the court, the witness said that the determination to pay a reward is made on the basis of the information furnished. "If after the Court Action the information proves to be true, then the reward is paid. It is information leading to the arrest and conviction of an individual, or individuals, in connection with a robbery" (Tr. 388). Applying that criteria, no reward had been paid to Schuler. (Tr. 388). Counsel's motion for a mistrial based on the assertion that the Court's questions had thrown aspersions on Schuler was denied (Tr. 389).

[9] Apparently, the trial judge was referring to defense counsel's direct examination of Mr. Hughes:

> Q. Does your company have an informant that goes by that name, sir, or an informant by that name?
>
> A. This would be an informant?
>
> Q. Yes, sir. Do you know what his full name was?
>
> A. I do. . . . His name was Tyrone Schuler (Tr. 373).

MRS. ROUNDTREE: I think he is more than that, Your Honor. I think he was a witness. He has testified he was a witness to this event and later he came.

THE COURT: An informer has a peculiar connotation in the law, as you well know. His testimony must be received with caution, and scrutinized with care.

MR. LAMB: In his kind of situation, no.

THE COURT: He is getting money for his information.

MRS. ROUNDTREE: Is there no evidence he did, in fact, get any?

THE COURT: I think the instruction should be given because of the characterization. I have to be fair to both sides. The jury is entitled to know the type of witness we are dealing with. . . .

6. *The Testimony of Other Defense Witnesses*

James Sorrell, Acting Supervisor of the Eastern Division of the D.C. Transit Company at the time of the crime, prepared on July 5 a report of the incident and received on July 1st Mr. Moon's written report (Tr. 390, 396).

Elliott Jackson, the sole passenger on the bus testified that he was "all the way in the back" of the bus; that he heard a commotion at the other end of the bus; that he didn't see anyone get on or off the bus; and that he talked to Mr. Moon and a detective, but neither the police nor the Transit Company subsequently contacted him (Tr. 399-402). He saw neither appellant that night (Tr. 402). The witness wore thick glasses and did not notice anything going on in the front part of the bus. He could not see defense counsel clearly in court (Tr. 403-04).

A former teacher of appellant Winston took the stand in an attempt to establish appellant's reputation. However, he had not discussed appellant's reputation with others and was asked no further questions (Tr. 405-06). Emma Hansford testified that Winston's reputation was that of an "honest, law abiding citizen" (Tr. 409).

After calling one Robert Stone, whose testimony established that Schuler's name had been obtained by the defense from the D.C. Transit Company on the first day of the trial, the defense called Detective Bell of the Metropolitan Police Department (Tr. 412-14). He testified that he responded to the scene of the robbery in a white 1965 Ford which he parked four or five feet from the bus, facing in the opposite direction, and that to his knowledge he spoke to no one named Tyrone Schuler (Tr. 414-17). Detective McCaffery testified that he was on the scene and saw the scout car, but did not speak to a Tyrone Schuler (Tr. 419).[10]

7. *The Testimony of Appellant Hawkins*

Hawkins, nineteen years old at the time of trial, began his testimony by confirming the stipulation (Tr. 427; see footnote 10 below. When he and Winston left his grandmother's house, they "walked down the steet where two girls were standing on the corner" (Tr. 428). Hawkins was wearing "[a] green plaid shirt and black pants" and was carrying the towel to "wipe sweat off [his] forehead" (Tr. 428). He claimed not to have worn short pants that day (Tr. 433).

He saw "[n]othing but police cars and a lot of people . . . gathering around" at the bus stop (Tr. 429). While he was in the vicinity, he saw Claudette Bradshaw and spoke to "[a] girl named Francene's mother" (sic), who wanted him to fix her washing machine (Tr. 429).[11] While he was standing in the vicinity of the bus stop, he "[s]aw the guy drop a bag . . . in a tree box about . . . a foot away from me" (Tr. 430). He picked it up because "[he] knew it was a gun in it. [He] felt it" (Tr. 430).

---

[10] After the Detective testified, appellant Winston rested his case. Appellant Hawkins' counsel made her opening statement, and it was then stipulated that if Hawkins' grandmother could have testified, she would have said that her grandson was at her house at approximately 10:00 p.m. that night (Tr. 422-25, 426).

[11] The witness claimed that he had been unable to locate this woman, and that he did not know where she lived (Tr. 429-30).

> their own minds as to whether he is in this category, based on what they have heard of him. But I think the Court should not be in a position of a fact finder under circumstances of this kind but if the jury finds from these facts that he is in that status, then they may apply this rule to his testimony.
>
> . . . . The essential thing we seek to do in giving the jury instructions is to give the jury a fair and accurate basis for evaluating the testimony of any witness.
>
> Now, a witness who has any interest in the outcome of the case is different from a witness who is completely disinterested. What the Court is seeking to do is to tell the jury on what basis they may make a fair evaluation of the testimony of this witness, among other things. It seems to me that he is not completely disinterested. He certainly is not the usual type of informer who may be subject to payment by the Government. . . . (Tr. 479-80, 489-90).

The trial judge read the instruction he intended to give (Tr. 490-92). Co-counsel objected that Schuler's interest, if any, could be "covered adequately by the general instruction that any witness that you may find, jury, to have an interest in this case, you may examine his testimony in the light of such an interest" (Tr. 492). The Court replied:

> You see, what you are doing by leaving it general is sweeping the issue under the rug. It's your own witness who says he is an informer. What the Court has done here is to indicate to the jury the basis on which they may proceed to evaluate his testimony as they would evaluate the testimony of any other witness. It is up to the jury. . . .
>
> Now these jurymen . . . have served in many cases. I assume some of them have served in cases in which the rather restrictive definition of informer played an important part of their evaluation of one so characterized. If the Court says nothing, they may decide well, this man is an informer, the defendant's own witness says he is an informer. Therefore we

will be very reluctant to give his testimony any weight. . . . (Tr. 492, 495).

2. *The Instruction*

The instruction as given is set out in Appendix A. Both counsel objected thereto on the grounds that it should not have been given (Tr. 568).

STATUTES AND RULE INVOLVED

Title 22, District of Columbia Code, Section 502, provides:

> Every person convicted of an assault with intent to commit mayhem, or of an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than ten years.

Title 22, District of Columbia Code, Section 2901, provides:

> Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years.

Title 22, District of Columbia Code, Section 3204, provides:

> No person shall within the District of Columbia carry either openly or concealed on or about his person, except in his dwelling house or place of business or on other land possessed by him, a pistol, without a license therefor issued as hereinafter provided, or any deadly or dangerous weapon capable of being so concealed. Whoever violates this section shall be punished as provided in section 22-3215, unless the violation occurs after he has been convicted in the District of Columbia of a violation of this section or of a felony, either in the District of Columbia or in another

jurisdiction, in which case he shall be sentenced to imprisonment for not more than ten years.

Rule 52(a), Federal Rules of Criminal Procedure, provides:

> Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

SUMMARY OF ARGUMENT

I

There was no error in refusing to suppress a pistol, towel and an ammunition clip recovered from appellant Hawkins, since both appellants were lawfully arrested. Apprehension occurred pursuant to on-the-scene descriptions given by the victim of the robbery to the police officer moments after it occurred. The officer was told the general direction in which the three suspects had fled. He sighted appellants about three blocks from the scene of the robbery in a location consistent with that which the bus driver said the robbers had taken and proceeding away from the scene of the crime. One of the men matched the description given by the bus driver. The other was holding a towel which the bus driver had said had been used to cover the gun during the robbery. There appeared to be something in the towel. Given the conjunction of these factors a prudent and cautious police officer could be said to have probable cause to believe that not only had a crime been committed but also that the appellants were two of the culprits involved therein.

II

The trial counsel properly instructed the jury that a defense characterization by both counsel and a defense witness of Schuler as an informer and who would be remunerated if persons he had named as perpetrators of the robbery (none of which included appellants) were tried and convicted could be found by them to be an informer or even if he was so found that his contingent in-

terest in the outcome of the trial could be so remote as to call for no particular suspicion or caution in assessing his testimony. The instruction was but a more formal statement of the ordinary process which the jury would undergo in assessing Schuler's testimony. The existence of three conditions precedent: (1) that Schuler must be found by the jury to be an informer; (2) that he must be found to have contingent interest; and (3) that his interest in the outcome of the litigation must not be too remote —did not infringe upon the fact finding authority of the jury nor did it result in the casting of aspersions on the witness.

In any event the error was harmless. The evidence was strong against both appellants, especially Winston, as to whom there was a positive identification by the victim of the crime. Moreover, the testimony of the witness Schuler was so incredible as to cause the jury to reject it in totality. Since the claimed basic defect of the instruction was that it discredited the witness the jury's rejection of his testimony moots the issue of the propriety of the instruction.

III

The trial court did not err in denying appellant Hawkins' motion for judgment of acquittal. Hawkins was arrested within minutes of the robbery. He was trotting away from the scene of the crime in the company of a man convincingly identified as a perpetrator thereof, two or three blocks from the scene of the crime and in a location consistent with the direction which the robbers were said to have taken. He was carrying a towel which the bus driver identified as having been used in the robbery. The towel contained a pistol which the bus driver identified as having been used in the robbery. With his cohort, he broke into a run or fast walk when the officer approached. Moreover, Hawkins' own testimony placed both appellants at the scene of the robbery at or about the time that it occurred. On these facts, viewed in the light most favorable to the government, it cannot be said that reason-

able jurymen must necessarily have a reasonable doubt as to appellant's guilt. Accordingly, the case was properly submitted to the jury.

ARGUMENT

I. An instruction that a defense witness characterized as an informant and who would be remunerated if persons not appellants were tried and convicted could be found by them to be an informer, but that if his interests were found to be remote, no particular suspicion or caution would be called for does not necessitate reversal.

(Tr. 175-76, 198, 222-24, 231, 236, 237, 241, 249-50, 328, 337, 338, 341, 372-74, 382, 414, 419, 474-75, 476, 479-80, 492, 493-94, 495, 528)

We are intrigued by the proposition presented by appellants in this regard. Both counsel for Hawkins and counsel for Winston apparently had no qualms about referring to Schuler as an informant, and a witness called by the defense so characterized this gentleman (Tr. 373, 528). We are now told that the instruction[13] which sprang from such a characterization amounted to reversible error. This Court should reject this proposition.

A. *The trial judge did not err in giving the instruction.*

The Government submits that the instruction was properly given.

At the outset, it should be noted that the trial judge quite carefully tailored the instruction to the circumstances of the case, after giving the matter considerable thought and discussing it with counsel on both sides. He was of the view that Schuler had an interest in seeing that appellants were acquitted,[14] and defense counsel was

---

[13] The instruction is set out in Appendix A.

[14] He was, we admit, justified in so concluding. Schuler had submitted to the D.C. Transit Company the names of persons he asserted were involved in robberies of bus drivers. His list did

constrained to agree that the witness "remotely may benefit from an acquittal in this case" (Tr. 474-75, 476). The trial judge noted that the jurors were experienced, and that they may have heard the "rather restrictive definition of an informer" before, and might revert to that definition upon hearing the characterization of the witness as an informant,[15] becoming "very reluctant to give [Schuler's] testimony any weight" if they were not otherwise instructed" (Tr. 495). His goal, an admirable one to be sure, was to "indicate to the jury the basis on which they may proceed to evaluate his testimony as they would any other witness", but leave the factual determination up to them (Tr. 492, 493-94). We submit that he succeeded, as a reading of the instruction shows.

The jury was to "receive his testimony with suspicion and act upon it with caution" only if they found from all the evidence that Schuler was an informer, *and* if they found "that his contingent interest in the possible future conviction of others for the crimes charged against [appellants] was [not] too *remote* to constitute an interest in the outcome of the trial". The three-step factual determination was left entirely in the hands of the jury. Assuming for the moment "the whole thrust of the . . . instruction was to single out Shuler's [sic] testimony for special treatment" (Br. 27, C.A. No. 21,291), we can see nothing objectionable in doing so as long as the basic factual determinations are left in the hands of the finders of fact. No aspersions were cast on the witness, and no

---

not contain appellants' names. If they were convicted, he would be precluded from receiving the reward which would accrue if any of the named persons were apprehended and convicted (See Tr. 382, 479-80).

[15] We do not view an assessment of fault as necessarily determinative of the issue of whether error occurred by giving the instruction. It is noteworthy, however, that the characterization of Schuler as an informant by defense counsel and a defense witness triggered the trial judge's consideration of the issue. The record indicates that had such characterizations been absent, the problem may well have been lost in the labyrinths of an already complex trial (Tr. 479).

atmosphere of suspicion or mistrust or discrediting of the witness arose. Moreover, we submit that the instruction was but a more formal framework within which the jury was to perform in the light of everyday experience its function of assessing the testimony of this witness. Put another way, giving the instruction merely resulted in the jury's doing what it would have done in any event—accept or reject, in whole or in part, Schuler's testimony. The trial judge is not bound to any particular format in instructing the jury. Indeed, the trial judge has wide discretion in shaping the charge to fit a particular case. *Shettel* v. *United States*, 72 App. D.C. 250, 113 F.2d 34 (1940); *Harris* v. *United States*, 367 F.2d 633 (1st Cir. 1966), *cert. denied*, 386 U.S. 915 (1967); *United States* v. *Meisch*, 370 F.2d 768 (3rd Cir. 1966). That discretion was not abused here. *Cf. Shettel, supra* (where defense requested instruction that if jury found witnesses to be professional detectives it should receive their testimony with a large degree of caution, it was not error to refuse to give such a charge, though it also would have been proper to give the instruction; charge given—that jury should consider the interest which the witnesses have in the result in weighing credibility, and that where the witnesses have a direct personal interest in the result there is a strong temptation to color, pervert, or withhold facts—was proper).[16] To provide as here a neutral framework in aid of the search for truth can hardly amount to reversible error.[17]

---

[16] *Cf. Hoffa* v. *United States*, 385 U.S. 293, 312 n.14 (1966) (Supreme Court noted without comment that the trial judge had instructed that "All evidence of a witness whose self interest is shown from either benefits received, detriment suffered, threats or promises made or any attitude of the witness which might tend to prompt testimony either favorable or unfavorable to the accused should be considered with caution and weighed with care."

[17] Appellant asserts that an informer's instruction is appropriate only when the Government's case is based upon the incriminating testimony of an informer who is paid by the Government to "turn up" cases by supplying information enabling it to appre-

B. *Assuming* arguendo, *that the instruction given was erroneous, only harmless error resulted.*

The thrust of appellants' argument with respect to prejudice is that the instruction may have caused the jury to discredit Schuler's testimony. But the jury most likely rejected the whole of Schuler's testimony as inherently incredible in any event, in which case the effect of the instruction is irrelevant. He claimed to have seen the robbery, two feet away from the bus when the robbers were boarding it (Tr. 249-50). He seemed not to be able to decide whether he was leaning against a beauty salon wall when it occurred or whether he was walking down the street (Tr. 231, 249). After it was over, he asserted that he talked to the bus driver at the scene and told Officer Liptak his name and address; that he was asked to go to the office of the company three times in connection with the robbery (Tr. 236, 237, 241). But Miss Webster could not remember having seen Schuler or anyone near the age of appellants standing near the bus that night (Tr. 328). Diane Lee also testified that she did not recognize Schuler as having been there that night, nor did she see any other persons around that night who were of the same age and size as appellants (Tr. 337, 338, 341). The Director of Security for the company testified that he met Schuler on one occasion—September 7, 1967 (Tr. 372-74). To his

---

hend and convict suspects. *Fletcher* v. *United States*, 81 U.S. App. D.C. 306, 158 F.2d 321 (1946) does not so hold. It holds only that it is error to deny a request by the defense for informer's instruction where a paid informer is involved and does not bear upon the issue here presented—except perhaps as it indicates that appropriate adjustments, consist with the circumstances, must be made in providing a framework for jury deliberation.

Appellant's excursion into cases involving accomplice instructions (Br. 22-26, D.C. Cir. No. 21,108), while informative, does not bear precisely enough on the unique issue here involved. Accomplices of course stand in a unique position in the law, and requiring full satisfaction as to the truth of their testimony once characterized may well shift the burden of proof where the accomplice testifies without corroboration for the defense. No such situation existed here, nor were appellants frustrated in putting their testimony before the jury.

knowledge, there were no cards bearing Schuler's name other than the one obtained at that time (Tr. 382). Neither Liptak nor Detectives McCaffery, Sanders or Bell spoke to anyone named Schuler at the scene (Tr. 175-76, 222-24, 414, 419). And the bus driver thought Schuler looked like the person who asked him if he went to Georgetown (Tr. 198).

That so many persons contradicted Schuler's testimony was reason enough to reject it. In addition, assertions by this witness such as that he was busy laughing during the course of the robbery, and his inability to satisfactorily explain how he could see the gun through the back of the second man on the bus and his description of Mr. Moon as having used a phone next to a Safeway buttress the conclusion that his testimony was and should have been rejected.

Moreover, in the larger context of the trial, any error the instruction could be said to have had minimal impact, given the convincing evidence, especially as to appellant Winston, against whom the evidence was particularly strong. Moreover, Schuler's testimony was not the linchpin of appellant's defense, for other witnesses testified in a manner consistent with appellants non-participation in the robbery.

For these reasons, any error in the instructions was harmless.

II. There was no error in failing to suppress items recovered from appellants since their arrests were based on probable cause.

(Tr. 107, 108, 111, 112, 118, 129; H. Tr. 6-7, 8, 9, 11, 12, 15, 18)

Appellant's argument that error occurred in failing to suppress a pistol, towel and an ammunition clip recovered from appellant does not call for extended comment. There is little doubt that "a prudent and cautious officer in [these] circumstances would have reasonable grounds—not proof or actual knowledge—to believe that a crime

had been committed and that appellant[s were] the offender[s]". *Williams* v. *United States*, 113 U.S. App. D.C. 371, 372, 308 F.2d 326, 327 (1962). "Much less evidence than is required to establish guilt is necessary." *Bailey et al* v. *United States*, D.C. Cir. Nos. 20,623, 20,624, 20,625 and 20,729, decided December 14, 1967 (slip opinion at 5).

In this case, there was no doubt that the arresting officer had probable cause to believe a crime had been committed (H. Tr. 11; Tr. 107, 108). The only contested issue here is whether there was probable cause to believe that appellants committed it. There was.

The officer arrived at the scene and received from the victim of the robbery information that the man who entered the bus and pointed a pistol at him was "[a]bout five eleven, [wearing] light colored shirt and dark pants" (H. Tr. 8). This man was said to have concealed the pistol within a green towel when boarding the bus (H. Tr. 6-7). Another man, the first to enter the bus, was said to be a Negro male, 18 to 19 years of age. The officer then went in the direction in which the suspects were said to have run (H. Tr. 7). There, within two or three blocks of the robbery and two or three minutes thereafter, he saw two men together, one of which fitted the description given by the bus driver (H. Tr. 8, 9, 12; Tr. 118, 129). The other man was carrying a green towel (H. Tr. 12).[18] They were both running and proceeding in a direction from the scene of the crime (H. Tr. 9, 18; Tr. 111).[19] Given the circumstances of this case—that appellants were arrested so close to the scene of the crime and within a short time thereof; that they were apparently running away from the scene; that Win-

---

[18] According to the officer's trial testimony, the towel was "folded in half and there seemed to be something inside the towel the way he was carrying it. . . . he had a hold of something that was inside the towel" (Tr. 112).

[19] Appellant Hawkins admitted that he was "trotting across the street" with a towel (H. Tr. 15).

ston fitted the description given by the bus driver and Hawkins was carrying the distinctive towel said to be involved in the robbery in a fashion indicating that something could be contained therein, a reasonable and prudent police officer could have reasonable grounds to believe that appellants were the culprits. Moreover, the exigencies of the situation, inasmuch as the suspects were known to be armed and could pose a danger to the lives of others, made the police action taken here all the more reasonable and indeed quite desirable.[20] See *Bailey et al* v. *United States*, *supra*; cf. *Davis* v. *United States*, 230 A.2d 485 (D.C. Ct. App. 1967).

The arrests having been valid, the items now complained of were properly admitted.

III. The Trial Judge did not err in denying appellant Hawkins' motion for judgment of acquittal.

(Tr. 30-31, 32, 33, 63, 64, 65, 66, 67, 69, 87, 89, 90, 111, 113, 114, 117-18, 120, 124, 126, 129, 137, 188, 249-52, 259, 325-26, 340-41, 361-65; H. Tr. 14-15)

Appellant Hawkins asserts that judgment of acquittal should have been granted because the government's evidence showed that he could not have been one of the robbers. But on the evidence here presented, viewed in the light most favorable to the Government, it cannot be said that reasonable jurymen must necessarily have a reasonable doubt as to Hawkins' guilt. See *Crawford* v. *United States*, —— U.S. App. D.C. ——, 375 F.2d 332 (1967).

Appellant Hawkins was arrested "about three blocks" from the place at which the robbery occurred (Tr. 129). He was arrested in the company of Winston, whose appearance fitted the description given the arresting officer

---

[20] We are unimpressed by appellant's reliance on *Gatlin* v. *United States*, 117 U.S. App. D.C. 123, 326 F.2d 666 (1963). The instant facts pinpoint the identity of appellants here involved than did the information in *Gatlin*. Moreover, nothing here indicates that the arrest was, as there, one for investigation.

by the bus driver, and who was conclusively identified in court by the latter as the man who had pulled back the towel and pointed the pistol at him (Tr. 30-31, 32, 33, 113). There was testimony that the arrests occurred "two or three minutes" after the robbery (Tr. 117-18). At the time of arrest, Hawkins was carrying a towel which the bus driver identified as the one used by appellant Winston in the robbery (Tr. 32, 111). Concealed in the towel (along with an ammunition clip) was the pistol which was identified as the one which was concealed in the towel at the inception of the robbery (Tr. 33, 113, 114, 126). When the officer approached the appellants, they "sort of walked fast or did a little run like towards—across North Carolina Avenue" (Tr. 111). The location at which the arrests occurred was consistent with the officer's information that the robbers had taken a course west on D Street, then south through an alley (Tr. 124). And, Hawkins' age roughly jibed with the ages of two of the robbers as estimated by the bus driver (Tr. 120, 188).

Reasonable jurymen could well conclude that Hawkins was one of the three young men participating in the robbery; that the three split up after running away together; that in the intervening moments between the robbery and the arrest, the towel and pistol were transferred to Hawkins, aiding Winston and in furtherance of the criminal scheme; that both appellants' actions in breaking into a fast walk or little run when approached by the officer signified their guilty knowledge and or desire to escape detection and capture for the robbery just committed.[21] The jury could have concluded that Hawkins was not an innocent non-participant who had just joined Winston in

---

[21] At the motion to suppress, Hawkins admitted that he was in the area with Winston at the time of the robbery and that he was "trotting across the street with a towel, the possession of which he explained by saying "I hadn't been home and I usually keep a towel when I get to sweating." When appellants were asked where they were running from, they replied that they were "just running" (H. Tr. 14-15). His own later testimony established that he was with appellant Winston, whom he had known for seven years, at the bus stop during the critical period and within 2-3 feet of the bus at one time, and that he had a towel during that time (Tr. 361-365).

proceeding away from the scene. It may be that possession of a towel was mere coincidence—but this is negated by the possession of the rather distinctive towel identified in the robbery. That towel additionally contained a pistol used in the robbery. Added to this is the temporal and spatial proximity of Hawkins to the scene of the crime, with a young man of similar age and positively identified as a robber, the fact that both were proceeding in a direction consistent with flight, and avoidance of connection with the crime, and that they both took actions consistent with a desire to flee and with a consciousness of guilt. Thus, a convincing picture of guilt beyond a reasonable doubt emerges.[22]

Appellant relies on *Goodwin* v. *United States*, 121 U.S. App. D.C. 9, 347 F.2d 793, *cert. denied*, 382 U.S. 920 (1965). But in *Goodwin* the Government's evidence could be more readily said to have left room for speculation. There were identifications of three men as robbers. A fourth man, not identified or shown to have been at the scene of the crime or waiting in the automobile in which the four men were stopped while the crime was being committed denied his participation in the crime. The trial judge submitted his case to the jury on the theory that the fourth man, a passenger, was in possession of recently stolen articles found in the car when it was stopped about an hour later, in another part of the city. This Court held that it could not be said beyond a reasonable doubt that the fourth man had been the lookout man or that he was in possession of the recently stolen articles, which were in a bag on the floor of the car. Here, the arrests

---

[22] It is difficult, as a practical matter, to conceive of a manner in which Hawkins could innocently have come into possession of both the gun and towel subsequent to the robbery. He did not testify that he loaned the towel to Winston, who had it on the bus. He did claim to have found the pistol when a passerby dropped it in the tree-box, but neither Miss Webster nor Miss Lee, whom it was claimed that Hawkins was conversing, saw this rather remarkable occurrence (Tr. 325-26; 340-41). The witness Schuler, who claimed to have been at the scene did not testify to any such occurrence though he asserted that he witnessed the robbery (Tr. 249-52, 259).

were much closer in space and time to the robbery. Hawkins was quite clearly in possession of the instrumentalities of the crime. And the arrest occurred in a location consistent with the flight path the robbers were alleged to have taken. Accordingly, the circumstances have pointed more clearly toward guilt.

Goodwin was distinguished in *Bailey, et al* v. *United States*, D.C. Cir. No. 20,623, 20,624, 20,625, 20,729, decided December 14, 1967. In *Bailey*, no positive identification was made of any of four men as the three men who entered a described car and fled after a robbery. The conviction of the driver, Russell, who was not even tentatively identified as a participant in the crime, was affirmed, as were the convictions of the other three occupants in the car, which was stopped about an hour later and found to contain the stolen money as well as the gun used in the robbery. The Court thought it important that each appellant was found to have in his immediate possession what was almost certainly part of the loot. They also noted that the fact that Russell was a driver made his presence more consistent with his being a lookout than an innocent passenger who joined the others after the crime was committed. The evidence as to the pistol and towel in Hawkins' immediate possession we submit, stands on no different footing than the possession of the money in *Bailey*. Here also Hawkins was in the company of a man identified as a participant. These factors, coupled with the evidence previously discussed, points convincingly toward appellant's guilt.

Appellant also relies on *Campbell* v. *United States*, 115 U.S. App. D.C. 30, 316 F.2d 681 (1963). But *Campbell* also presented much weaker inculpatory evidence than the instant situation. Campbell's fingerprints were found on a car owned by one of two men identified as a robber, but their presence there was consistent with the evidence that Campbell had recent occasion to use the car. Campbell was found with nothing connecting him with the crime, though Campbell's keys were found in the robber's

room. Moreover, two witnesses who *knew* Campbell could not say that he was one of the two participants in the robbery (emphasis added).[23]

Thus, the peculiar circumstances of this case, viewed against applicable case law, were sufficient to avoid judgment of acquittal. Compare *Bullock* v. *United States*, 81 U.S. App. D.C. 271, 157 F.2d 702 (1946), *cert. denied*, 330 U.S. 829 (1947). (Complainant could identify neither of two witnesses who robbed him of a suitcase. Appellant was seen and arrested with a man carrying a suitcase shortly after the encounter and they attempted to escape at the stationhouse. The Court rejected claims that the inability to identify appellants and the absence of possession of fruits of the assault necessitated granting of judgment of acquittal).[24]

---

[23] *Aikens* v. *United States*, 98 U.S. App. D.C. 66, 232 F.2d 66 (1956) was similarly a stronger defense case. *Inter alia*, Kingsbury, an appellant therein, was never shown to be in possession of implements of the crime.

[24] Appellant's argument is hinged on the proposition that the testimony showed that appellant could not have been either the first or third robber. We submit that this does not dispose of the issue, for the motion could have withstood attack whether or not appellant was actually identified by the bus driver because of the circumstances surrounding Hawkins' actions. Moreover, appellant's assertion that the bus driver "testified positively that appellant was not one of the two men that (sic) had gotten on the bus" (Br. 19). But this statement, viewed in the light most favorable to the Government, loses its force in view of the witness' statements that he just did not recognize Hawkins (Tr. 31); that "As for as I know, I don't know" whether Hawkins was one of the men; and that his attention was concentrated on Winston (Tr. 30, 63, 64, 69). The bus driver made no mention of short pants to Officer Liptak (Tr. 137). The truth of the matter would appear to be that the witness could make no judgment whatsoever with respect to appellant Hawkins—or with respect to the third man (See Tr. 65, 66, 67, 87, 89, 90).

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
ALBERT W. OVERBY, JR.,
Assistant United States Attorneys.

APPENDIX

APPENDIX A

THE INSTRUCTIONS

Now ladies and gentlemen, in the argument of respective counsel, there was some reference to the witness Shuler [sic]. You may recall the testimony of the witness from the Capital Transit Company, one Hughes, who characterized the witness Shuler [sic] as an informer.

The Court wishes to give you this instruction as to what is involved in this situation so that you may properly evaluate it.

One of the witnesses called by the defendant Winston, Tyrone Shuler [sic], was described by another witness for Winston, one Hughes, of the Capital Transit Company, as an informer. The testimony of Hughes, as the Court recalls it, and here again the Court wishes to emphasize, it is your recollection of the testimony which should be controlling during your deliberations, that Shuler [sic] had given information to this company concerning certain violations of law said to have been committed on company busses. The company agreed to compensate Shuler [sic] on a contingent basis. That is to say, he would be paid if the information he gave led to the conviction of one against whom he gave the information.

If you find from the evidence before you that Shuler [sic] was, in fact, an informer, then you should not disgegard [sic] his testimony solely for this reason. However, you may find from the evidence that he had a contingent interest in giving the testimony to the Capital Transit Company, as a result of which his testimony should be examined by you with greater care than the testimony of an ordinary witness. You should scrutinize it closely to determine whether it is colored in such a way as to cause doubt concerning the guilt of the defendants in this case, for the reason that the witness Shuler [sic] had implicated others in this crime, and that if these others were proven guilty, he would stand to benefit thereby.

If you determine from all the evidence that Shuler [sic] was, in fact, an informer, and that he had a contingent interest in the outcome of the case, then you should receive his testimony with suspicion and act upon it with caution.

Now on the other hand, you may find from the evidence that Shuler [sic] was not, in fact, an informer of the D.C. Transit Company, or even if he was an informer, that his contingent interest in the possible future conviction of others for the crime charged against these defendants too remote to constitute an interest in the outcome of the trial, and that his testimony is therefore entirely free from pecuniary or other objectionable motivation.

In that case you need not treat the testimony of the witness Shuler [sic] with any particular suspicion or caution but may give it such weight as you feel it is entitled to, remembering that you are the sole judges of the credibility of each and all of the witnesses in the case (Tr. 550-52).

* * * *

Now ladies and gentlemen, there has been in the Court's instructions some reference to the testimony of the witness Shuler [sic]. The Court wishes to give you this additional short definition from Black's Law Dictionary as to what an informer is: "A person who informs or prefers an accusation against another whom he suspects of the violation of some penal statute" is an informer (Tr. 567).

☆ U. S. GOVERNMENT PRINTING OFFICE, 1959 287024 553